No. 80-966
IN THE

Supreme Court of the United States

October Term, 1980

HELEN SMITH,

Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, As Receiver of UNITED STATES NATIONAL BANK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Ninth Circuit.

BRIEF OF PETITIONER IN REPLY.

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Introduction.

This Brief is submitted by Petitioner, Helen Smith, in reply to the opposition Brief (hereafter "Resp.") filed herein on behalf of the Federal Deposit Insurance Corporation (Hereafter "FDIC"). Rule 22.5.

The total failure of the FDIC to support any of its points with references to the record in the trial court proceedings, and to even address the critical points raised in the Petition (hereinafter "Pet."), underscores the merit of the Petition.

ARGUMENT.

FDIC repeats the ritualistic facade structured by the Court of Appeals[1] in affirming the only known *sua sponte* dismissal in the Southern District of California (or reported from any other federal court) where counsel objected to dismissal for failure to prosecute, stated a desire to proceed, had been given no prior warning, and was not afforded any alternative to outright dismissal. *See*, Pet. 14-15.[2] The Court of Appeals did not cite or discuss *any* part of the record which gave "ample support" for the dilatoriness perceived. A20-A21. It is certain that the Solicitor General would have provided record references if "ample support" existed. But he did not, and there was none.

Instead of record references, FDIC cites the misleading Order of Dismissal[3] (Resp. 3), the erroneous Memorandum

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[1]The Court of Appeals wrote: " 'dilatory and uncooperative conduct' are *amply supported by the record*," and "prejudice to the defendants was *supported by the record*." Pet. A 21. Emphasis added. FDIC mistakenly adds the word "amply" to the last quote. Resp. 6. Hereafter page references preceded with the letter "A" refer to the Appendix of the Petition.

[2]The view here urged is that if our system of jurisprudence malfunctions because of lawyer misconduct affecting docketing mechanics, the system is not improved by penalizing the principals. *See*, 7 *Moore's Federal Practice*, ¶ 60.27 [2], n. 47 at 369 (2nd ed. 1979). Of course, contrary to the facts in this case, where alternatives have been explored and the attorney ignores proffered options and court orders, the only solution may be dismissals of the action. *See*, *Brown v. E. W. Bliss Company*, 72 F.R.D. 198 (Md. 1976).

[3]The Order (A1) notes "no proceedings in this case for more than 12 months." However, it totally ignored the interdependent court proceedings between the related parties (Petitioner, Respondent, and the Trustees of Westgate-California Corp. ("WCC")) during that 12-month period. *See*, items 27 through 37, A10.

Decision and Order[4] (Resp. 3), the unsupported findings[5] (Resp. 2), and the Court of Appeals' rubber stamp affirmance[6] (Resp. 4).

More telling than the utter failure of the FDIC and the courts below to give record support to the claims and findings of dilatoriness and actual prejudice is the failure to mention or explain the trial court's refusal to "consider some of the less drastic alternative sanctions at its disposal," which is a standard requirement in all the Circuits. *See, Tolbert v. Leighton*, 623 F.2d 585 at 587 (9th Cir. 1980); Pet. 10-14.

Finally, FDIC makes no response whatsoever to Petitioner's argument that "the reasons articulated by the Court

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[4]The Memorandum (A2-A4) erroneously stated that "approximately five months after this court entered an Order dismissing . . ., plaintiff moves for [Fed. R. Civ. P. 60(b)] relief. . . ." A3. The Order dismissing was entered March 17, 1977 and Petitioner filed its motion for 60(b) relief on April 15, 1977 — less than one month later. Item 38, A10. The hearing on the 60(b) motion was on May 16, 1977, only two months after the Order dismissing. The trial court also erroneously criticized counsel for raising matters on the 60(b) motion "which properly could have been brought to the court's attention [at the first hearing]." A3. The Supreme Court has made clear that "a more adequate explanation for the absence of Petitioner's counsel from the pretrial conference" is appropriate under Rule 60(b). *Link v. Wabash R. Co.*, 370 U.S. 626, 635 (1962). The explanation in the case at bar was erroneously ignored. Pet. 7.

[5]The Findings (A15-A19), prepared after remand (A13-A14) did not include any supporting documents as contemplated by item 3 of the remand order (A13). Findings 8 and 9 (A17) are grossly misleading, and do not reveal that all of the so-called problems and mis-labeled dilatoriness began in December 1974 and ended in June 1975. Pet. 3-4. As noted, FDIC does not dispute Petitioner's representation of the record and adds no other instances of dilatoriness. Finding 10 ignores items 27 through 37, A10. Finding 11 makes reference to no fact which could be identified as an impediment. Again, FDIC makes no reference to the record because there is absolutely nothing in the record to support the finding. *See*, Pet. 15-17.

[6]The Court of Appeals' Memorandum, unlike the detailed facts found in *Link, supra*, 370 U.S. at 629, n. 2. makes no reference to the record but simply intones the "ample support" cliche.

of Appeals for affirming are not supported from the record or by inference." Pet. 15-20

The decision by Petitioner's counsel to avoid further piece-meal litigation between Petitioner and WCC until there could be one more trial settling all claims has been largely vindicated. On March 23, 1981, the Ninth Circuit reversed the summary judgment entered by the Honorable William B. Enright subordinating all of Petitioner's claims against WCC.[7]

It is simply ridiculous to conclude that Petitioner's counsel should have prosecuted the claims for unpaid merchandise and designer fees against lien holders while it was so jousting with the principal debtor, WCC. Yet, this must be the conclusion of the lower courts when they fault counsel (in a capital manner) for failing to proceed more expeditiously. The almost certain result of efforts by counsel to proceed would have been a successful objection by lienholders (FDIC) to proceeding without the presence and assistance of the debtor, WCC.

If the civility, the respect, with which the Bar deals with the courts is "an indispensable part — the lubricant — that keeps our adversary system functioning,"[8] likewise there must exist a modicum of respect by the courts for the Bar. "Every judge must remember that no matter what the provocation, the judicial response must be judicious response. . . ."[9] It is hard to believe any practicing attorney in America today would have predicted that when present

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[7]The summary judgment motion was filed November 5, 1976 (item 34, A10); was denied by the Bankruptcy Court January 13, 1978 (item 42, A11); was reversed by the District Court May 15, 1978 (item 45, A11); and was, in turn, reversed by the Ninth Circuit on March 23, 1981 (Docket No. 78-2603).

[8]Honorable Warren E. Burger, Chief Justice, "The Necessity for Civility," 52 F.R.D. 211, 218 (1971).

[9]*Id.* at 215.

counsel responded on January 3, 1977 to the housekeeping chore under Local Rule 10, a client's one million dollar claim was about to be vaporized because of counsel's misconduct.

Despite the grievous error and injustice perceived to have been committed below, we are mindful that this Court cannot correct each erroneous decision by lower courts. Nevertheless, it is sincerely believed "that proper supervision of the federal judiciary demands that the lower court[s] [in the case at bar] be set aright." Stern, *Supreme Court Practice*, 299 (5th ed., 1978). This case *does* present an egregious departure "from the accepted and usual course of judicial proceedings." Rule 17.1(a).

Moreover, it is believed that the Bar of this nation ought to learn from the Supreme Court whether the action of the judiciary in this case is to be condoned. Was there a true exercise of discretion or "a pointless exaction of retribution"?[10] *Jackson v. Washington Monthly Co.*, 569 F.2d 119 at 123 (D.C. Cir. 1977).[11] Is this case "an excellent example of the sort of wholly unnecessary waste of judicial resources which can result from . . . overzealous protection of trial court dockets."? *Link, supra*, Justice Black dissenting, 370 U.S. at 649.[12]

The final irony, which this Court knows, is that judicial economy is not achieved, judicial discipline is not enhanced

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[10]On a similar note, in reversing the summary judgment of subordination entered by the same District Judge against Petitioner, the Ninth Circuit, by Justice Poole, wrote: "[S]ubordination of all of appellant's claims at this point would be primarily punitive and not consistent with equitable principles." *In re Westgate-California Corporation*, . . . F.2d 896, 901 (9th Cir. 1981, No. 78-2603).

[11]In the cited case Justice Robinson collects an exceptional array of authorities and writes a very scholarly opinion.

[12]In *Link*, Chief Justice Warren and Justice Douglas also dissented and Justices Frankfurter and White took no part.

and respect for the legal process is not fostered by results like the one below. The issue of damages sustained because of counsel's misconduct, if any, will be dealt with later by the courts. The ultimate outcome of judicial proceedings is further delayed and made more unpredictable. Stability is decreased and client and counsel unnecessarily frustrated.

Conclusion.

It is submitted that the *sua sponte* dismissals here involved were punitive, retributive, and inconsistent with the accepted and usual course of judicial proceedings. The Petition should be granted, the lower courts set aright, and justice achieved.

Date: April 13, 1981.

Respectfully submitted,

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